

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CHRISTOPHER KYLE PRATER,
Plaintiff,
v.
IRVIN GOODWIN, et al.,
Defendants.

Case No. [5:14-cv-04876-HRL](#)

**ORDER DENYING MOTION FOR
EXTENSION OF TIME TO APPEAL**

Re: Dkt. No. 86

On March 24, 2017, this court granted summary judgment in favor of defendants and entered judgment that same day. On July 31, 2017, plaintiff Christopher Prater filed a Notice of Appeal, along with a motion for an extension of time to appeal, claiming that he did not receive notice of the judgment until May 18, 2017. Defendants oppose the motion. Although the court invited Prater to submit additional briefing on the matter, he did not to do so. Briefing has closed, and the matter is deemed suitable for determination without oral argument. Civ. L.R. 7-1(b). Upon consideration of the moving and responding papers, the court denies the motion.

Ordinarily, an appeal must be taken within 30 days after entry of judgment. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). Federal Rule of Appellate Procedure 4(a) is the exclusive means for relief from the expiration of the period to file a timely notice of appeal. In re Stein, 197 F.3d 421, 425-26 (9th Cir. 1999).

1 Prater seeks relief under Federal Rule of Appellate Procedure 4(a)(5), arguing that his
2 motion is based on “excusable neglect.” Rule 4(a)(5) provides that the district court may extend
3 the time to file a notice of appeal, but only if the party moves for an extension within 30 days of
4 the expiration of the time to file the notice and shows excusable neglect or good cause. Fed. R.
5 App. P. 4(a)(5). Prater cannot obtain an extension under Rule 4(a)(5) because he did not file his
6 request within 30 days of the expiration of the time to file the notice of appeal.

7 Federal Rule of Appellate Procedure 4(a)(6) provides the exclusive means for an extension
8 of time to appeal for failure to learn that judgment has been entered, In re Stein, 197 F.3d at 425,
9 and provides as follows:

10 **(6) Reopening the Time to File an Appeal.** The district court may reopen
11 the time to file an appeal for a period of 14 days after the date when its
12 order to reopen is entered, but only if all of the following conditions are
satisfied:

13 (A) the court finds that the moving party did not receive notice
14 under Federal Rule of Civil Procedure 77(d) of the entry of the
judgment or order sought to be appealed within 21 days after entry;

15 (B) the motion is filed within 180 days after the judgment or order is
16 entered or within 14 days after the moving party receives notice
under Federal Rule of Civil Procedure 77(d) of the entry, whichever
is earlier; and

17 (C) the court finds that no party would be prejudiced.

18 Fed. R. App. P. 4(a)(6). If the motion to reopen is not filed within the deadline imposed by Rule
19 4(a)(6), the district court does not have authority under the rule to reopen or extend the time for
20 filing an appeal. Vahan v. Shalala, 30 F.3d 102, 103 (9th Cir.1994).

21 Prater claims that he did not receive notice of the court’s judgment until May 18, 2017.
22 The court finds no basis to conclude or reasonably infer that is true. Federal Rule of Civil
23 Procedure 77(d) provides that notice must be served in accordance with Federal Rule of Civil
24 Procedure 5(b). Rule 5(b) provides a number of ways of effecting service, including “sending it
25 by electronic means if the person consented in writing.” Fed. R. Civ. P. 5(b)(2)(E). At his
26 request, Prater was given permission to e-file. (Dkt. 23). The court’s docket indicates that upon
27 filing of the summary judgment order and judgment, notice was automatically sent via email to
28 Prater at kcprater74@gmail.com, the same address he continues to use and identify on his court

1 filings. Prater says that he would not have overlooked such an email. But, in order to rebut the
2 presumption of receipt, Prater must submit evidence supporting a finding that he did not receive
3 notice. Nunley v. City of Los Angeles, 52 F.3d 792, 796 (9th Cir. 1995). He provides no
4 evidence that he did not receive notice of the judgment at or about the time it was entered on
5 March 24, 2017, nor does this court find any basis to reasonably infer that he did not receive
6 notice.¹

7 In any event, Federal Rule of Appellate Procedure 4(a)(6)(B) states that a motion to reopen
8 the time to appeal must be “filed within 180 days after the judgment or order is entered or within
9 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the
10 entry, *whichever is earlier*.” Fed. R. App. P. 4(a)(6)(B) (emphasis added). Even assuming Prater
11 did not receive notice until May 18, 2017, as he claims, his motion should have been filed no later
12 than June 1, 2017. His request was filed too late to obtain an extension under Fed. R. App. P.
13 4(a)(6).

14 Based on the foregoing, Prater’s request for an extension of time to appeal is denied.

15 SO ORDERED.

16 Dated: September 11, 2017

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HOWARD R. LLOYD
United States Magistrate Judge

¹ As noted in this court’s interim order, Prater apparently intended to submit a declaration in support of his motion, but he did not. This court gave him additional time to do so by August 14, 2017. No declaration was ever filed.

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5:14-cv-04876-HRL Notice has been electronically mailed to:

Christopher Kyle Prater kcprater74@gmail.com

Jennifer J. Capabianco jcapabianco@selmanbreitman.com, rmartin@selmanlaw.com